

THE HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.3207 OF 2016

ORDER:

This revision, under Article 227 of the Constitution of India, is filed challenging the Order in I.A. No.86 of 2016 in O.S. No.160 of 2007 passed by the Junior Civil Judge, Amadalavalasa, dismissing the application filed under Rule 17 of Order XVIII of the Code of Civil Procedure, 1908 (for short, 'CPC') to recall D.Ws.1 and 2 for limited purpose of marking documents, which were marked as Exs.A.123 and X.1 respectively in O.S. No.19 of 1999 between the same parties in respect of the same schedule property.

02. The petitioners filed I.A. No.86 of 2016 under Rule 17 of Order XVIII of CPC to recall the witnesses, D.Ws.1 and 2, for limited purpose of marking documents contending that the document dated 24.05.1961 executed by Pyli Gunnamma could not be filed as it was misplaced, and the same was marked as Ex.A.123 wherein the Southern boundary was mentioned as the site of Navagana Appadu, who was the father of the second petitioner. Therefore, the said document is relevant to decide the real controversy between the parties. It is also contended that when the wife of the second petitioner, Navagana Durgamma, was examined as P.W.5 in O.S. No.19 of 1999, marked certified copy of the registered sale deed, the same could not be filed, as the original was misplaced, along with the written statement. Now the second petitioner obtained certified copy of those documents, to mark those documents, the witnesses-D.Ws.1 and 2 are to be recalled for the limited purpose and prayed to allow the petition.

03. The respondents did file no counter.

04. The trial court, after hearing both the petitioners and the respondents, dismissed the petition on the ground that the record in

O.S. No.19 of 1999 was summoned from the record room of the Junior Civil Judge, Amadalavalasa, on the application of the petitioners, to mark documents, which were marked as Exs.A.123 to A.125 in O.S. No.19 of 1999. Again the counsel for the defendants filed the present petition seeking permission to mark the document-Ex.A.123 in O.S. No.19 of 1999 through D.W.1 and certified copy of registered sale deed dated 17.11.2007 through D.W.2. Marking of documents twice in the same series is totally unnecessary and dismissed the petition.

05. Aggrieved by the order passed by the trial court, the present revision is filed on the ground that the trial court in confusing state concluded that the documents which were proposed to be marked and the documents marked earlier by summoning from the record room of the Junior Civil Judge, Amudalavalasa, are one and the same, but, in fact, they are different and that the trial court did not consider the scope of Rule 17 of Order XVIII of CPC, passed impugned order erroneously and prayed to set aside the same.

06. During hearing, learned counsel for the petitioners, while reiterating the contentions urged in the revision petition, drawn the attention of this Court to discrepancy with regard to the documents, to prove the claim of the petitioners/ defendants and the defence set up by the defendants in the suit, it is necessary to recall D.Ws.1 and 2 for limited purpose of marking two documents.

07. None appeared for the respondents.

08. The main endeavour of the learned counsel for the petitioners is that the petitioners/ defendants referred the documents in the written statement, but those documents could not be produced along with the written statement as they were misplaced and that too, the purpose of summoning the witnesses-D.Ws.1 and 2 is to substantiate their claim by marking the documents proposed to be

marked and the suit at the stage of argument and in case the documents were not allowed to be marked by recalling the witnesses-D.Ws.1 and 2, the petitioners will be put to serious loss and prayed to allow the revision petition setting aside the order under challenge dated 06.06.2016 passed by the Junior Civil Judge, Amadalavalasa.

09. Admittedly, the suit was filed in the year, 2007 and the written statement was also filed as early in the year 2007 itself by the petitioners herein. Rule 1-A of Order VIII of CPC mandates the defendant to produce documents upon which relief is claimed or relied upon by him and if the document is not in possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is. A document which ought to be produced in court by the defendant under this rule, but, it is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. Therefore, leave from the trial court is necessary to file such documents and mark them as exhibits. In the entire written statement, there was no reference about execution of documents, except the document executed by Gondu Ramulu on 16.02.1962 and the Will dated 15.09.1992 bequeathing the property in favour of the second petitioner creating life interest etc. Therefore, there is reference about execution of the document, but did not comply the mandatory requirement under Sub-Rules 1 and 2 of Rule 1-A of Order VIII of CPC. But without producing those documents, they proceeded with the trial and closed their evidence, the matter was being adjourned from time to time for arguments, at this stage, the present petition came to be filed with a request to recall the witnesses-D.Ws.1 and 2, for marking those two documents.

10. The petitioners did not explain the reason as to why these documents, which are within the knowledge of the petitioners/defendants, were not marked when D.Ws.1 and 2 were

examined-in-chief before the trial court, except contending that those documents were misplaced. When the execution of those two documents are in the knowledge of the petitioners/ defendants, nothing prevented them to obtain certified copies of those registered documents. Misplacing of those documents was not mentioned in the written statement as required under sub-Rule 1 and 2 of Rule 1-A of Order VIII of CPC, but suddenly produced certified copies before the trial court and sought for recall of the witnesses-D.Ws.1 and 2 for limited purpose. The trial court dismissed the petition on the ground that these documents were already marked by summoning the documents in O.S. No.19 of 1999, from the record room of Junior Civil Judge, Amadalavalasa.

11. It is also a specific allegation about the execution of these two documents in the affidavit of D.Ws.1 and 2 under Rule 1 of Order VIII of CPC, even then the petitioners did not take steps to obtain certified copies and produce the same before the court and mark them as exhibits on their behalf.

12. Having maintained silence for a long period, the petitioners filed the present petition to recall or summon the witnesses-D.Ws.1 and 2. In **VADIRAJ NAGGAPPA VERNEKAR (DECEASED BY L.RS.) V. SHARAD CHAND PRABHAKAR GOGATE**^[1] a similar situation came up before the Apex Court, wherein it was held at paragraphs 16 and 17 as follows:

“Though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. As indicated by the learned single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared

and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared. In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after cross-examination of the witness that certain apses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC, such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

17. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Of course, if the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for reexamination-in-chief with permission to the defendants to cross examine the witness thereafter. There is nothing to indicate that such is the situation in the present case. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out."

13. In view of the principles laid down in the above judgment, when a particular fact is within the knowledge and when referred the document in the written statement as well as the affidavit filed under Rule 4 of Order XVIII of CPC, failure to take steps to produce the document in the evidence of witnesses is fatal and filing application to recall the witnesses under Rule 17 of Order XVIII of CPC directly

amounts to filling up the lacunae in the evidence and it is not the purpose and intention of the legislature in incorporating the Rule 17 of Order XVIII of CPC, since the factum of existence of two documents which the petitioners proposed to mark recalling witnesses D.Ws.1 and 2 is within the knowledge and it is not subsequent event that came to notice of the petitioners. Therefore, in such circumstances, this Court cannot permit the parties to recall the witnesses to fill up the lacunae in the evidence of D.Ws.1 and 2.

14. The main contention of the learned counsel for the petitioners is that in case no permission is granted, it is difficult for the petitioners to prove their case. But it is for the petitioners to establish their own case and when the petitioners were not diligent in prosecuting the proceedings, this Court cannot exercised the power under Rule 17 of Order XVIII of CPC in the name of substantial justice or total justice to the parties. Therefore, by applying the principles laid down in the above decision, I find no ground to set aside the order.

15. The power of this Court under Article 227 of Constitution is limited and such power has to be exercised sparingly in view of the Judgment of the Apex Court in **HARI VISHNU KAMATH VS. SYED AHMAD ISHAQUE AND OTHERS**^[2] and hence this court cannot interfere with the order passed by the trial court.

16. In the result, the revision is dismissed. No costs. Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SATYANARAYANA MURTHY, J

20.07.2016
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[\[1\]](#) AIR 2009 SC 1604

[\[2\]](#) 1955 1 SCR 1104